APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED, DECIDED AND FILED NOVEMBER 9, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1999

(Argued: March 24, 2000 Decided: NOV -9 2000)

Docket No. 99-9015

ANITA LERMAN and ANGELO D'ANGELO,

Plaintiffs-Appellants,

— v. —

BOARD OF ELECTIONS IN THE CITY OF NEW YORK; BOARD OF ELECTIONS OF THE STATE OF NEW YORK; and GEORGE E. PATAKI, GOVERNOR,

Defendants-Appellees.

Before:

FEINBERG, JACOBS, AND STRAUB, *Circuit Judges*.

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Appendix A

SJTRAUB, *Circuit Judge*:

The late former Speaker of the United States House of Representatives, Thomas P. "Tip" O'Neill, was fond of saying that "all politics is local." TIP O'NEILL, ALL POLITICS IS LOCAL (1994). Through its requirement that witnesses to ballot access "designating petitions" be "resident[s] of the political subdivision in which the office or position is to be voted for," N.Y. ELEC. L. § 6-132(2) (McKinney 1998), the State of New York has attempted to elevate this political adage into an affirmative command. The Constitution, however, protects certain forms of political activity from government interference even if they transcend local political boundaries. While the state does have legitimate interests that justify regulating the electoral process — especially when it seeks to protect the integrity of that process — it cannot mandate that *all* political activity be "local" without demonstrating the required fit between its chosen means of regulation and those legitimate ends.

We conclude that the section 6-132(2) witness residence requirement severely burdens interactive political speech and association rights protected by the First Amendment (as incorporated by the Fourteenth Amendment) without advancing *any* legitimate or important state interest. Accordingly, we hold this particular statutory requirement unconstitutional on its face.

BACKGROUND

John Sollazo, a registered member of the Independence Party of New York, sought to compete in the primary election

held September 14, 1999, in order to gain the nomination of the Independence Party for the New York City Council seat representing the 50th Council District in Staten Island. In order for a City Council candidate's name to appear on the primary election ballot, New York law requires that candidate to file a "designating petition" containing valid signatures from at least five percent of the registered party members within the district from which the candidate seeks election.[1] *See* N.Y. ELEC. L. §§ 6-118, 6-136(2) (McKinney 1998). In Sollazo's case, therefore, it was necessary for him to obtain 38 valid petition signatures, representing five percent of the 760 registered Independence Party members in the 50th District. Plaintiff Anita Lerman, a resident of the 49th Council District, served as a witness to the signatures on Sollazo's petition, witnessing a total of 58 signatures including those of Plaintiffs Angelo D'Angelo and Pio D'Agostino,[2] both of whom are residents of the 50th District. Lerman, however, lives outside the 50th District. Accordingly, defendant Board of Elections in the City of New York ("NYC Board") ruled, on August 3, 1999, that these 58 signatures were invalid, since New York law requires that designating petition signatures be witnessed by either a notary public, a commissioner of deeds, or an individual who not only is "duly qualified" to vote in New York and an "enrolled voter of the same political party" as

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1. Notwithstanding this five percent threshold, the statute also provides that for any office that is "to be filled in the city of New York by all the voters of any city council district," the candidate's designating petition need not contain more than nine hundred signatures. N.Y. ELEC. L. § 6-136(2)(c-1) (McKinney 1998).

2. D'Agostino is not a party to this appeal.

the petition signers, but also is a "resident of the political subdivision in which the office or position is to be voted for." N.Y. ELEC. L. § 6-132(2)-(3) (McKinney 1998). Lerman did not circulate Sollazo's designating petition as a notary public or commissioner of deeds.

The plaintiffs filed a complaint *pro se* against the NYC Board, the New York State Board of Elections ("NYS Board"), and Governor George Pataki in August 1999, seeking declaratory and injunctive relief on the grounds that the witness residence requirement in section 6-132(2) violates the First and Fourteenth Amendments on its face by permitting only district residents to be eligible to witness signatures on the candidate's designating petition. The NYC Board moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(6), and after oral argument on August 31, 1999, the District Court (Frederic Block, *Judge*) delivered an opinion from the bench dismissing Plaintiffs' complaint in its entirety. Judgment was entered on September 3, 1999. Plaintiffs moved this Court for an expedited appeal on the grounds that the primary election was to be held on September 14, 1999; that motion was denied. The primary election took place as scheduled without Sollazo's name on the ballot.

DISCUSSION

We review the District Court's dismissal of the plaintiffs' complaint *de novo*. *See Posr v. Court Officer Shield No. 207*, 180 F.3d 409 (2d Cir. 1999). Since most *pro se* plaintiffs lack familiarity with the formalities of pleading requirements, we must construe *pro se* complaints liberally, applying

a more flexible standard to evaluate their sufficiency than we would when reviewing a complaint submitted by counsel.[3] *See, e.g., Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam). In order to justify the dismissal of the plaintiffs' *pro se* complaint, it must be " 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Haines*, 404 U.S. at 521 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

I. Preclusive Effect of *Molinari v. Powers*

In another, widely noted New York ballot access case that was litigated in the Eastern District of New York after briefing in this appeal had been completed, but before oral argument, the NYS and NYC Boards entered into a stipulation providing that several provisions of the New York Election Law "impose[d] an undue burden on access to the ballot in connection with the 2000 New York State Republican Presidential Primary." *Molinari v. Powers*, No. 99 Civ. 8447, Stipulation at 2 (E.D.N.Y. Feb. 4, 2000). The parties in that case also agreed to waive their rights to appeal from any order entered by the district court based on that stipulation, *see id.*, and upon acceptance by the district court, the stipulation served as the predicate for that court's order of preliminary injunctive relief. *See Molinari v. Powers*, 82 F. Supp. 2d 57, 68-69 (E.D.N.Y. 2000) (Korman, C.J.).

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3. While counsel now has appeared on behalf of each of the plaintiffs in this appeal, the plaintiffs' complaint initially was filed in the District Court *pro se*. We therefore evaluate the sufficiency of the complaint using the less stringent standard applicable to *pro se* plaintiffs. *See Elliott v. Bronson*, 872 F.2d 20 (2d Cir. 1989).

Appendix A

The district court in *Molinari* accepted the parties' stipulation "only after independently concluding that the scheme, both in its totality and by virtue of two of its individual but related elements," including the section 6-132(2) witness residence requirement, "places an undue burden on the right to vote under the First Amendment." *Id.* at 69.

After counsel appeared for the *pro se* plaintiffs and oral argument was held in this appeal on March 24, 2000, we ordered the parties to submit supplemental briefs addressing all of the issues presented on appeal, including the preclusive effect, if any, of the stipulation and order entered in *Molinari*. *See Lerman v. Board of Elections*, No. 99-9015, Order at 1-2 (2d Cir. Mar. 30, 2000). In their supplemental brief, the plaintiffs argue that the defendants in this case[4] are indeed precluded from defending the constitutionality of the section 6-132(2) witness residence requirement by virtue of the *Molinari* stipulation and order. The plaintiffs suggest that

> the defendants' behavior looks disquietingly like an attempt to have the best of both worlds — to abandon their defense of § 6-137 in a politically sensitive, vigorously contested case that was closely followed in the press, but avoid the usual precedential effects of doing so by pursuing their

4. While Governor Pataki was not a party in *Molinari*, the plaintiffs maintain that his absence from that case has no bearing upon whether issue preclusion applies here, since the NYS and NYC Boards, which were parties in *Molinari*, are responsible for enforcement of New York election laws. *See* N.Y. ELEC. L. § 3-104 (McKinney 1998).

> defense of § 6-132 in what was a *pro se*, low profile, appeal.[5]

Supp. Brief of Plaintiffs-Appellants at 11. To allow the defendants to relitigate the constitutionality of the section 6-132(2) witness residence requirement, the plaintiffs maintain, would "give[ ] the lawsuit 'the aura of the gaming table.' " *Id.* (quoting *Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313, 338 (1971)). The defendants respond that *Molinari* has no preclusive effect in this case, since *Molinari* did not decide the precise issue that we confront in this case and the conclusion made by Chief Judge Korman in *Molinari* concerning the constitutionality of the section 6-132(2) witness residence requirement went beyond what was necessary to grant the *Molinari* plaintiffs the relief they requested.

We are not untroubled by the possibility that the defendants have attempted to evade their stipulation in *Molinari* that the section 6-132(2) witness residence requirement imposes an "undue burden" on political speech and their waiver of the right to argue otherwise on appeal in that case. However, the preclusion issue is close — and since the merits of this case are not, we dispose of this case on the

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5. Section 6-137 of the New York Election Law sets forth the framework governing the selection of delegates and alternate delegates in the Democratic and Republican Parties' presidential primary elections for the year 2000. N.Y. ELEC. L. § 6-137 (McKinney Supp. 2000); *see also Molinari v. Powers*, 82 F. Supp. 2d 57, 59-60 (E.D.N.Y. 2000). The witness residence requirement in section 6-132(2) applies to designating petitions filed under section 6-137 on behalf of presidential candidates.

merits without reaching any conclusion as to the preclusive effect of *Molinari*.

II. Mootness

The NYC Board argues that the plaintiffs' claims are moot, since the September 1999 primary election is over, having taken place without John Sollazo's name on the ballot. However, this contention is mistaken since the plaintiffs' claims fall within the exception to the mootness doctrine for issues "capable of repetition, yet evading review." *Meyer v. Grant*, 486 U.S. 414, 417-18 n.2 (1988) (challenge to ballot access provisions for ballot propositions is controversy capable of repetition, yet evading review); *see Members for a Better Union v. Bevona*, 152 F.3d 58, 61-62 (2d Cir. 1998). Both of the two preconditions for invoking this doctrine have been met — the challenged action was too short to be fully litigated prior to its expiration, and there is a reasonable expectation that the same complaining parties would be subject to that same action in the future. *See Grant*, 486 U.S. at 417-18 n.2; *Krislov v. Rednour*, 226 F.3d 851, 858 (7th Cir. 2000). Since the issues presented in this case "will persist in future elections, and within a time frame too short to allow resolution through litigation," *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 628 (2d Cir. 1989), the NYC Board's mootness argument necessarily fails.

III. Standing

The NYC Board also contends that as a resident of the 49th Council District, Lerman lacks standing under Article III to bring this action because she is "unaffected by the

outcome" of the election in the 50th Council District and therefore suffers no injury from the absence of Sollazo from the primary ballot in that district. The District Court expressly declined to address the question, but indicated offhand that it, too, did not think Lerman had standing under Article III.[6] The District Court also concluded that plaintiffs lacked prudential standing to challenge the section 6-132(2) witness residence requirement on its face, rather than only as applied to them. Both of these contentions are mistaken.

First, it is clear that Lerman has standing under Article III to assert her own claims under the First Amendment.[7] In order to have standing under Article III, Lerman must

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6. While opining that Lerman's standing was "very questionable," the District Court elected not to address the Article III standing question, asserting that "in light of my decision, the standing issue is not terribly compelling here, because I'm deciding the case on the merits, in any event." *Lerman v. Board of Elections*, No. CV-99-4901, transcript at 19 (E.D.N.Y. Aug. 31, 1999). However, such an assertion of "hypothetical jurisdiction" — assuming that Article III jurisdiction exists for the purpose of deciding the merits — has been rejected by the Supreme Court. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-94 (1998); *id.* at 101 ("Hypothetical jurisdiction produces nothing more than a hypothetical judgment — which comes to the same thing as an advisory opinion, disapproved by this Court from the beginning."). Thus, because the District Court had doubts about Lerman's standing under Article III to pursue this action, it should have addressed this threshold question directly before proceeding to address the merits. *See id.* at 93-102.

7. At no point has it been suggested that D'Angelo and D'Agostino, who were signatories to candidate Sollazo's designating petition, lack standing under Article III.

demonstrate that (1) she has suffered an "injury in fact" that is "concrete and particularized" as well as "actual or imminent," rather than "conjectural or hypothetical"; (2) the injury is "fairly traceable" to the challenged conduct; and (3) it is likely, rather than "merely speculative," that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotation marks omitted). The determination of whether Article III standing exists also must comport with the "manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. Since this case remains at the pleading stage, all facts averred by the plaintiffs must be taken as true for purposes of the standing inquiry — as they must be for any other issue presented. "[G]eneral factual allegations of injury resulting from [the challenged statute and conduct] may suffice [to support the existence of standing], for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim."[8] *Id.* (internal quotation marks and citation omitted).

Lerman appears rather easily to have met the three requirements set forth by *Defenders of Wildlife*. Having

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8. We also note that the obligation to "read the pleadings of a *pro se* plaintiff liberally and interpret them 'to raise the strongest arguments that they suggest,' " *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999), extends to the question of standing no less than it does to any other issue. *See Platsky v. C.I.A.*, 953 F.2d 26, 28-29 (2d Cir. 1991) (per curiam) (reversing district court for dismissing *pro se* complaint for lack of standing without explaining formalities of pleading and affording *pro se* plaintiff an opportunity to replead).

associated with Sollazo in order to promote his political candidacy and help him gain access to the primary election ballot, Lerman asserts injury in having been deprived of the opportunity to gather signatures in behalf of his candidacy. *Cf. Coalition for Sensible & Humane Solutions v. Wamser*, 771 F.2d 395, 399 (8th Cir. 1985) (refusal by election officials to appoint individual members of association as voter registrars caused injury-in-fact sufficient to confer standing, by preventing those individuals from registering new voters). Moreover, the NYC Board has acted directly to strike those designating petitions witnessed by Lerman, and in the context of an action "challenging the legality of government action," we must draw some significance from the fact that Lerman is a *direct* "object of the action . . . at issue." *Defenders of Wildlife*, 504 U.S. at 561. Given the nature of the defendants' challenged conduct, there should be "little question that the [defendants'] action . . . has caused [her] injury, and that a judgment preventing . . . the action will redress it." *Id.* at 561-62 (distinguishing such challenges from challenges in which the "asserted injury arises from the government's allegedly unlawful regulation . . . of someone else," a situation in which "much more is needed" to aver standing).

The NYC Board rests its challenge to Lerman's standing primarily on the argument that because she does not live in the 50th District, she is "unaffected by the outcome of an election for a council seat" within that district and therefore suffered no injury from Sollazo's exclusion from the primary election ballot. However, the NYC Board's suggestion that any cognizable "injury-in-fact" stops at the electoral district's edge misunderstands the nature of the plaintiffs' challenge

to section 6-132(2). The cases cited by the NYC Board in support of its argument make that misunderstanding apparent.[9] For example, the NYC Board analogizes this case to *United States v. Hays*, 515 U.S. 737 (1995), which held that individuals living outside a "racially gerrymandered" electoral district lack standing to challenge its apportionment as violating the Equal Protection Clause of the Fourteenth Amendment. In the context of so-called "racial gerrymandering," however, the injury-in-fact is caused by the "special representational harms" that result from being identified and placed in a particular electoral district based on one's race — the underlying source of the injury is the racial classification, not the apportionment as such. *Id.* at 745; *see also id.* at 739 (individuals have standing to challenge "racial gerrymandering" if they are district residents *or* if they "demonstrate[ ] that they, personally, have been subjected to a racial classification"). Here, Lerman does not assert a *representational* injury of the sort considered in *Hays*. Rather, it is section 6-132(2)'s geographic restriction *itself* that is alleged to cause the injury-in-fact to Lerman's rights to engage in interactive political speech and expressive

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9. The NYC Board's argument also misunderstands the nature of the Article III standing inquiry itself, for it appears to conflate the threshold question of Lerman's standing under Article III — *i.e.*, whether she has alleged an "injury-in-fact" that is fairly traceable to the challenged conduct and redressable by a favorable judicial decision — with the question of whether Lerman has a valid claim on the merits. The two questions, however, are distinct. *See Coalition for Sensible & Humane Solutions*, 771 F.2d 395, 399-400 (8th Cir. 1985) (holding that unregistered voter and individuals denied status as registrars have standing to challenge registrar appointment process, but denying their claim on the merits).

political association across electoral district boundaries. Indeed, from Lerman's perspective, it is the very fact that these speech and associational interests have nothing to do with district boundaries that renders the witness residence requirement problematic. The injury-in-fact she alleges concerns the very process of engaging in political activity in support of Sollazo's candidacy, and that injury is sufficient to confer standing under Article III.

Second, in addition to their standing to challenge the section 6-132(2) witness residence requirement as applied to their own speech and associational activity, the plaintiffs also have third party (or *jus tertii*) standing to challenge the witness residence requirement on its face. The question of standing encompasses both constitutional and prudential considerations. *See Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984) ("In addition to the limitations on standing imposed by Art. III's case-or-controversy requirement, there are prudential considerations that limit the challenges courts are willing to hear."); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982) ("The term 'standing' subsumes a blend of constitutional requirements and prudential considerations . . . ."); *Singleton v. Wulff*, 428 U.S. 106, 112 (1976) (constitutional requirements under Article III and prudential requirement that plaintiffs be the "proper proponents of the particular legal rights on which they base their suits" are distinct aspects of standing inquiry). The issue of whether a facial challenge may be entertained is one such prudential consideration, "a species of third party (*jus tertii*) standing" by which "a party seeks to vindicate not only his own rights, but those of others who may also be

adversely impacted by the statute in question." *City of Chicago v. Morales*, 527 U.S. 41, 55-56 n.22 (1999) (plurality opinion); *see also Joseph H. Munson Co.*, 467 U.S. at 956-58 (permitting facial challenge under First Amendment overbreadth doctrine as exception to prudential limitations against third party standing); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-613 (1973) (same).

The District Court concluded that the plaintiffs lacked standing to raise a facial challenge to the section 6-132(2) witness residence requirement, asserting that in order for that challenge to go forward, the plaintiffs needed to "establish that no set of circumstances exists under which the act would be valid." *Lerman v. Board of Elections*, No. CV-99-4901, transcript at 7 (E.D.N.Y. Aug. 31, 1999) (citing *City of New York v. United States*, 179 F.3d 29, 33 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 932 (2000)). The standard relied upon by the District Court derives from the Supreme Court's statement in *United States v. Salerno*, 481 U.S. 739, 745 (1987). *Salerno*, however, does not apply to this case, in which the plaintiffs assert the violation of rights protected by the First Amendment.[10] Rather, since the plaintiffs

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10. It is not even clear that *Salerno*'s "no set of circumstances" test articulates an exclusive standard for making facial challenges outside the First Amendment context, as a plurality of the Supreme Court recently has noted:

> To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself

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challenge a statute regulating the ability to engage in interactive political speech and associational activity, their standing to challenge the statute on its face is governed by the overbreadth doctrine. *See Joseph H. Munson Co.*, 467 U.S. at 956-57. Under the overbreadth doctrine, the plaintiffs need only "demonstrate a substantial risk that application of the provision will lead to the suppression of speech." *National Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998); *see also Broadrick*, 413 U.S. at 612-615 (holding that statutes inhibiting the exercise of First Amendment rights may be invalidated on their face if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep"). *Cf. Salerno*, 481 U.S. at 745 (noting applicability of overbreadth doctrine to First Amendment claims). When a

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> (even though the defendants in that case did not claim that the statute was unconstitutional as applied to them, . . . the Court nevertheless entertained their facial challenge).

City of Chicago v. Morales, 527 U.S. 41, 55-56 n.22 (1999) (plurality opinion) (citation omitted); *see also Janklow v. Planned Parenthood*, 517 U.S. 1174, 1175-76 (1996) (memorandum of Stevens, J., respecting the denial of the petition for certiorari) (questioning applicability of *Salerno* standard); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992) (declining to apply *Salerno*, and holding instead that abortion law is facially unconstitutional if "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion"); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235 (1994).

litigant challenges a statute on its face as overly broad, the prudential limitations against third party standing are relaxed, and the litigant may assert the rights of individuals whose interests might be affected by the statute but who are not before the court.[11] *See Joseph H. Munson Co.*, 467 U.S. at 956-57; *Broadrick*, 413 U.S. at 612.

The plaintiffs clearly have standing under both Article III and the overbreadth doctrine to challenge the section 6-132(2) witness residence requirement, both as applied to them and on its face. We therefore proceed to address the merits of the plaintiffs' claims.

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11. In this context, the NYC Board's argument that the plaintiffs do not have third party standing to assert Sollazo's rights as a candidate for office is misplaced. To be sure, were we solely to consider the prudential limitations against third party standing in isolation, we might well conclude that the plaintiffs lack third party standing to assert Sollazo's claims, since there is no indication that Sollazo faces any hindrance to the assertion of his own rights. *See Campbell v. Louisiana*, 523 U.S. 392, 397 (1998); *Singleton v. Wulff*, 428 U.S. 106, 115-16 (1976). However, since this case arises under the First Amendment, and the plaintiffs challenge the statute on its face, we do not consider those limitations against third party standing in isolation. The plaintiffs therefore have third party standing to assert Sollazo's rights, but only, of course, insofar as they have standing under the overbreadth doctrine to assert the rights of *any* third party whose interests might be affected by the statute, but who are not before the court. *See Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956-57 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

IV. Constitutionality of the Section 6-132(2) Witness Residence Requirement

The district court in *Molinari* concluded that the section 6-132(2) witness residence requirement is unconstitutional on its face, violating the First Amendment (as incorporated by the Fourteenth Amendment) by infringing upon the plaintiffs' political speech and associational rights and their right to equal protection. *See Molinari v. Powers*, 82 F. Supp. 2d 57, 73-77 (E.D.N.Y. 2000). We agree substantially with Chief Judge Korman's decision in *Molinari*, and hold that the witness residence requirement in section 6-132(2) is unconstitutional on its face. *See id.*; *accord Buckley v. American Constitutional Law Found.*, 119 S. Ct. 636, 661 & n.1 (1999) (Rehnquist, C.J., dissenting) (stating that the Court's decision "invalidates a number of state laws" and that section 6-132, among other state laws, is now in "serious constitutional jeopardy"); *Rockefeller v. Powers*, 917 F. Supp. 155, 161 (E.D.N.Y. 1996) (Korman, C.J.) (witness residence requirement in section 6-132(2) "performs [no] essential function"), *aff'd*, 78 F.3d 44, 46 (2d Cir. 1996).

A. *The Burden on First Amendment Rights and Degree of Scrutiny to Be Applied*

In determining the level of scrutiny to be applied to the section 6-132(2) witness residence requirement, we first must assess the extent to which that requirement burdens First and Fourteenth Amendment rights. *See Buckley v. American Constitutional Law Found., Inc.*, 119 S. Ct. 636, 642 (1999); *id.* at 649 (Thomas, J., concurring); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). When state election laws subject

speech, association, or the right to vote to " 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' " *Burdick*, 504 U.S. at 434 (citation omitted); *see also Prestia v. O'Connor*, 178 F.3d 86, 88 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 539 (1999); *Schulz v. Williams*, 44 F.3d 48, 56 (2d Cir. 1994). By contrast, when a state election law "imposes only reasonable, nondiscriminatory restrictions" upon First and Fourteenth Amendment rights, then "the State's important regulatory interests are generally sufficient to justify the restrictions." *Burdick*, 504 U.S. at 434 (internal quotation marks omitted); *see also Prestia*, 178 F.3d at 88. The burden imposed by the challenged regulation is not evaluated in isolation, but within the context of the state's overall scheme of election regulations. *See Prestia*, 178 F.3d at 88.

Ordinarily, policing this distinction between legitimate ballot access regulations and improper restrictions on interactive political speech does not lend itself to a bright line or "litmus-paper test," *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983); *see also American Constitutional Law Found.*, 119 S. Ct. at 642, but instead requires a particularized assessment of the nature of the restriction and the degree to which it burdens those who challenge it. *See Burdick*, 504 U.S. at 434; *Schulz*, 44 F.3d at 56. However, in those cases in which the regulation clearly and directly restricts "core political speech," as opposed to the " 'mechanics of the electoral process,' " it may make "little difference whether we determine burden first," since "restrictions on core political speech so plainly impose a 'severe burden' " that application of strict scrutiny clearly will be necessary.

American Constitutional Law Found., 119 S. Ct. at 650 (Thomas, J., concurring) (internal citations omitted); *see id.* at 642 n.12 (opinion of the court); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 345 (1995) (declining to apply severe/lesser burdens balancing test to direct regulation of "pure speech").

The petition circulation activity at issue in this case, while part of the ballot access process, clearly constituted core political speech subject to exacting scrutiny. *See American Constitutional Law Found.*, 119 S. Ct. at 651 (Thomas, J., concurring) (applying strict scrutiny to voter registration requirement for initiative petition circulators); *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) ("[T]he circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.' "); *Krislov v. Rednour*, 226 F.3d 851, 866 (7th Cir. 2000) (stating that "circulating nominating petitions [for political candidates] necessarily entails political speech"). As the Supreme Court held in Grant, petition circulation "of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change." 486 U.S. at 421.

It should be clear, however, that even if one characterizes this restriction on petition circulation as being more directly concerned with the "mechanics of the electoral process" than with speech, requiring us to evaluate the severity of the burdens on political speech and association posed by that regulation before determining the level of scrutiny to be applied, the witness residence requirement severely burdens

political speech by "drastically reduc[ing] the number of persons . . . available to circulate petitions." *American Constitutional Law Found.*, 119 S. Ct. at 643; *see id.* at 651 (Thomas, J., concurring) (restriction on petition circulation severely burdens speech if it "reduces the voices available to convey political messages"); *Grant*, 486 U.S. at 422-23 (prohibition on paid petition circulators restricts political speech by "limit[ing] the number of voices who will convey appellees' message and . . . mak[ing] it less likely that appellees will garner the number of signatures necessary" to gain access to ballot, thereby limiting their ability to influence public political discussion); *Krislov*, 226 F.3d at 860 (statute limiting petition circulators to residents of the political subdivision for which the office is to be voted substantially burdens political speech by "preclud[ing] the candidate from utilizing a large class of potential solicitors to convey his message"); *Molinari*, 82 F. Supp. 2d at 76 (witness residence requirement in section 6-132(2) substantially burdens political speech because it reduces the number of individuals available to circulate designating petitions and, therefore, "reduces the chances that those supporting the candidates will gather signatures sufficient to qualify for the ballot"). Moreover, petition circulation bears an intimate relationship to the right to political or expressive association. The right to political association also "is at the core of the First Amendment, and even practices that only potentially threaten political association are highly suspect." *Krislov*, 226 F.3d at 860 (quoting *McCloud v. Testa*, 97 F.3d 1536, 1552 (6th Cir. 1996)) (internal quotation marks omitted). Obviously, the section 6-132(2) witness residence requirement does not ban association between candidates and non-residents of the electoral district altogether — but the

statute need not go that far in order to substantially burden the right to political association. "[B]y preventing the candidates from using signatures gathered by [non-resident] circulators . . . , the law inhibits the expressive utility of associating with these individuals because these potential circulators cannot invite voters to sign the candidates' petitions in an effort to gain ballot access." *Krislov*, 226 F.3d at 861.

Sollazo's particular case highlights the burdens on political speech and association imposed by the section 6-132(2) witness residence requirement. First, there should be little doubt that the witness residence requirement dramatically reduced the number of potential petition circulators available to advance Sollazo's political message. As counsel for Lerman noted at oral argument, there are approximately 170,000 registered members of the Independence Party statewide, but only 760 in the 50th District. The witness residence requirement therefore renders almost 99.5 percent of all Independence Party members ineligible to circulate petitions within the 50th District. The fact that many of these statewide party members might not have had any interest in circulating petitions on behalf of Sollazo has no bearing upon the burden that the residence requirement imposes upon interactive political speech. Even if, as a practical matter, the requirement only prevented Sollazo from using a handful of those statewide party members, "for some minor candidates" — especially for a minor party candidate, such as Sollazo, running in a political subdivision as small as the 50th District — "parting with one or two avid circulators could significantly impact their campaigns," *Krislov*, 226 F.3d at 862.

Second, while Sollazo formally needed only 38 signatures to qualify for the ballot, as a practical matter a candidate seeking election "needs a surplus of signatures, because they will likely be challenged on any number of grounds, resulting in some, perhaps many, invalidations."[12] *Krislov*, 226 F.3d at 859-60; *Molinari*, 82 F. Supp. 2d at 75 (noting that the "facially low percentage of signatures" required in each district does not mitigate the witness residence requirement's burden on speech since the "burdens New York places on the petitioning process make it far more difficult to obtain the requisite signatures"). For minor political candidates such as Sollazo, that burden can be particularly severe. While candidates who are well-financed or favored by their party's leadership might have ready access to the resources necessary to ensure that they qualify to appear on the ballot, many candidates — especially those challenging their party's leadership — do not. *Cf.* NEW YORK STATE COMM'N ON GOV'T INTEGRITY, ACCESS TO THE BALLOT IN PRIMARY ELECTIONS: THE NEED FOR FUNDAMENTAL REFORM 10-11 (1988) (noting high costs of New York ballot access process and accompanying litigation to candidates, especially those who are not supported by party organizations). Furthermore, since voters may not sign designating petitions for "a greater number of candidates for public office or party position than the number of persons to be elected," N.Y. ELEC. L. § 6-134(3) (McKinney 1998), the task for

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12. Indeed, in the context of the Republican presidential primary, the chairman of the New York State Republican Party conceded that a campaign must collect at least *six times* the required number of signatures "to ensure survival against post-petition challenges" that almost invariably result from New York's arcane technical requirements. *Molinari*, 82 F. Supp. 2d at 75.

challengers or other minor candidates becomes that much more formidable. Because of this rule, candidates seeking ballot access necessarily face a "shrinking pool" of potential signatories as the petitioning period progresses, whereby those voters who already have signed the petition of another candidate are no longer available to sign another petition.[13] Under these circumstances, identifying and obtaining even a small number of signatures can be like trying to find the proverbial needle in a haystack — especially for a candidate, like Sollazo, who seeks the nomination of a minor party whose pool of potential petition signatories may already be quite small from the outset of the petitioning period. *See Molinari*, 82 F. Supp. 2d at 67-68 (discussing the shrinking pool problem). Thus, even an election law that requires a candidate to obtain "only a relatively small number of signatures" still can severely burden the right to engage in interactive political speech under the First Amendment "if it also preclude[s] the candidate from utilizing a large class of potential solicitors to convey his message, or if it substantially restrict[s] the candidate's ability to choose the means of conveying his message." *Krislov*, 226 F.3d at 860.

The District Court distinguished *American Constitutional Law Foundation* by positing a distinction between *initiative* petition circulators, whom it considered to be engaged in interactive political speech, and *candidate* petition circulators

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13. Under this requirement, only the first signature given by a voter is considered valid; if the voter subsequently signs the petitions of other candidates, those later signatures are deemed invalid. On the other hand, if both of the voter's signatures bear the same date, then neither signature is considered valid. *See* N.Y. ELEC. L. § 6-134(3) (McKinney 1998).

such as Lerman, whom it considered to be engaged in a "classic ballot access type" of activity. *Lerman v. Board of Elections*, No. CV-99-4901, transcript at 10-11 (E.D.N.Y. Aug. 31, 1999). It ultimately relied upon this distinction to conclude that the section 6-132(2) witness residence requirement poses only a minimal burden on interactive political speech and, therefore, less scrutiny was required when evaluating that requirement than in *American Constitutional Law Foundation*. This distinction, however, is rather strained. There is no basis to conclude that petition circulation on behalf of a candidate involves any less interactive political speech than petition circulation on behalf of a proposed ballot initiative — the nature of the regulated activity is identical in each instance. The District Court's distinction depends almost entirely upon its characterization of candidate petition circulation as being "classic," but the fact that candidate elections have a longer history than ballot initiatives or referenda upon petition does not actually establish anything with respect to the burden placed on "interactive political speech." To be sure, the distinction between candidate and initiative campaigns can be relevant in certain circumstances. For example, the government's interest in preventing corruption or the appearance of corruption is sufficiently important to justify limits on contributions to candidate campaigns, but is not sufficiently important when it comes to regulating contributions to initiative campaigns, since there are no candidates to corrupt in those campaigns. *Compare Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (government interest in preventing corruption or the appearance of corruption is "constitutionally sufficient justification" for limits on contributions to candidate campaigns), *with First Nat'l Bank of Boston v. Bellotti*,

435 U.S. 765, 790 (1978) ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." (citations omitted)). By contrast, the strength of the state's interest in preserving the integrity of the ballot access process itself is no greater when petition circulators advocate in behalf of particular candidates than it is when they advocate in behalf of ballot initiatives. The distinction between candidate and initiative elections, therefore, is not salient in this context.

Indeed, if the distinction between candidate and initiative ballot access petition bears any relevance at all, it may well suggest the *opposite* conclusion from that reached by the District Court — namely, that the witness residence requirement places an even greater burden on candidate petition circulators than on initiative petition circulators. *See Krislov*, 226 F.3d at 861-62. Unlike initiative campaigns, which typically concern a single issue, campaigns for political office typically require candidates to advance their positions on a variety of issues. As a result, individuals who circulate petitions on behalf of candidates for office typically "must speak to a broader range of political topics" than those who circulate petitions in support of ballot initiatives, and by limiting the number of individuals available to circulate petitions on behalf of candidates, the section 6-132 witness residence requirement "has the potential to squelch a greater quantity and broader range of political speech than laws which only restrict initiative proponents." *Id.* Since we decline to rely upon this distinction, we disagree with the District Court's conclusion that the witness residence requirement presents only a minimal burden on political speech and association.

B. *Application of Strict Scrutiny to the Section 6-132(2) Witness Residence Requirement*

Since the section 6-132(2) witness residence requirement imposes a severe burden on political speech and association, the requirement must therefore be narrowly tailored to advance a compelling state interest in order to pass constitutional muster. *See California Democratic Party v. Jones*, 120 S. Ct. 2402, 2412 (2000); *Buckley v. American Constitutional Law Found.*, 119 S. Ct. 636, 642 n.12 (1999); *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 225 (1989). As in *Molinari*, the defendants attempt to justify the section 6-132(2) witness residence requirement based on three asserted interests: (1) ensuring integrity and preventing fraud in the electoral process; (2) ensuring that candidates demonstrate "a sufficient modicum of support" before their name is included on the ballot; and (3) ensuring that non-residents may not "impose [ ] the cost of a primary on the district." *Molinari v. Powers*, 82 F. Supp. 2d 57, 73-74 (E.D.N.Y. 2000) (internal quotation marks omitted). Again, we agree with Chief Judge Korman's decision in *Molinari* and conclude that the witness residence requirement does not bear even a *rational* relationship to any of these three justifications, let alone the narrowly tailored relationship that strict scrutiny demands.

As a general matter, the first interest asserted by the defendants — ensuring integrity and preventing fraud in the electoral process — is unquestionably compelling. *See Krislov v. Rednour*, 226 F.3d 851, 859 (7th Cir. 2000) ("Because elections must be regulated to remain free from fraud and coercion, some latitude is given to regulations

designed to serve these purposes."); *Schulz v. Williams*, 44 F.3d 48, 57 (2d Cir. 1994) (noting that states are "entitled to take steps to ensure that elections are 'fair and honest' "). And were the defendants able to establish that the use of non-resident petition circulators did, in fact, pose a demonstrable threat to the integrity of the signature collection process, we would be obliged to give greater weight to their argument. However, the fact that the defendants asserted interests are "important in the abstract" does not necessarily mean that its chosen means of regulation "will in fact advance those interests." *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994). And in general, the potential dangers to the integrity of the electoral process are more remote during the signature collection process than at the actual time of balloting on election day. *See American Constitutional Law Found.*, 119 S. Ct. at 648; *Grant*, 486 U.S. at 427; *(WIN) Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000); *Krislov*, 226 F.3d at 865. Accordingly, we cannot uphold a statutory provision that substantially burdens political speech and association at the petition stage of the electoral process without insisting that the defendants "do more than simply 'posit the existence of the disease sought to be cured.' " *Turner Broadcasting Sys.*, 512 U.S. at 664; *see Krislov*, 226 F.3d at 865.

The defendants have failed to suggest *any* meaningful relationship between the section 6-132(2) witness residence requirement and their interest in protecting the integrity of the signature collection process. With respect to that interest, the "usual justification" for a residence requirement is to ensure that the petition witness be answerable to a subpoena. *Molinari*, 82 F. Supp. 2d at 73; *see also American*

Constitutional Law Found., 119 S. Ct. at 644. The witness residence requirement in section 6-132(2), however, does nothing to advance that end. Since the local Boards of Elections in New York have statewide subpoena power, *see* N.Y. ELEC. L. § 3-218(1) (McKinney 1998), the state's purpose is already served by the less burdensome requirements in section 6-132(2) that a petition witness (1) live anywhere within the State of New York, and (2) provide their residence address in an affidavit filed together with the petitions.[14] *See* N.Y. ELEC. L. § 6-132(2) (McKinney 1998); *Molinari*, 82 F. Supp. 2d at 73; *see also American Constitutional Law Found.*, 119 S. Ct. at 644 (state residence requirement "more precisely achieve[s] the State's subpoena service objective" than voter registration requirement (internal quotation marks omitted)); *Krislov*, 226 F.3d at 865 (state interest in maintaining the integrity of the electoral process "can be achieved just as easily (and probably more effectively) through" the more narrowly tailored process for challenging invalid signatures).

There also is little reason to believe the defendants' assertion that district residents are more likely to have "some

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14. The plaintiffs do not challenge those provisions in section 6-132 that require petition witnesses to be qualified voters in the State of New York and registered members of the party of the candidate for whom they wish to circulate petitions. Since the plaintiffs do not challenge these provisions, we need not resolve their constitutionality. We conclude only that these requirements are more narrowly tailored to the state's interest in ensuring the integrity of the ballot access process than the witness residence requirement. *See American Constitutional Law Found.*, 119 S. Ct. at 644-45.

familiarity with persons who sign petitions" or be more qualified to ensure the integrity of the petition circulation process. In an electoral district consisting of many thousands of voters, the likelihood of district residents having any greater "personal familiarity" than non-residents is rather low. Indeed, New York law no longer even requires, as it once did, that petition witnesses attest to personal knowledge of the identity of designating petition signatories. *See Molinari*, 82 F. Supp. 2d at 73-74 (discussing requirement under predecessor to section 6-132(2) that subscribing witness "know[ ] each of the voters whose names are subscribed" to the candidate's petition (internal quotation marks and citation omitted)). Further casting doubt on the defendants' asserted justification for the witness residence requirement is the fact that verification of petition signatures has become considerably easier than it once was given the use of signature imaging technology. Under this system, the signature of every registered voter in each of New York's sixty-two counties may be verified rather easily against a digitized version of that voter's signature on file with the local boards of elections in each county and the city of New York. *See* NEW YORK STATE BD. OF ELECTIONS, ANNUAL REPORT 14 (1999) (discussing availability of signature imaging technology in every county as of 1999, and its use in helping local boards of elections "to more easily validate a voter's eligibility in each individual election"); *see also Schulz*, 44 F.3d at 59 (suggesting that existence of "statewide computer system . . . capable of checking the registration status" of all New York voters might, once implemented, "change[ ] the calculus" by which ballot access restrictions are to be evaluated); *Molinari*, 82 F. Supp. 2d at 72 (noting that computerization of New York voter registration lists

makes it considerably easier to verify identity of petition witnesses and signatories and, therefore, undermines justification for requirement that a petition witness "separately list the town or city in which he or she resides in addition to his or her residence address."). By the same token, if this rationale is understood to mean that district residents are more likely to be aware of the physical boundaries of that district, so as to avoid soliciting invalid signatures from individuals who are not district residents, then the state's interest reduces to mere paternalism, based on the notion that "the State needs to protect candidates because they aren't savvy enough to find solicitors who can read a street map, and thereby refrain from soliciting signatures outside the relevant district." *Krislov*, 226 F.3d at 864.

Noting the exception to the residence requirement that permits non-resident notaries public or commissioners of deeds to circulate and witness petitions, *see* N.Y. ELEC. L. § 6-132(3) (McKinney 1998), the defendants urge us, in effect, to characterize petition circulators as quasi-public officials. Such a characterization, however, does not accurately reflect the role actually played by petition circulators in the ballot access process. As partisans of the candidates for whom they are circulating petitions, petition circulators — regardless of whether they are district residents — almost certainly are motivated entirely by an interest in seeing their candidate gain access to the ballot, rather than any interest in ensuring integrity in the signature collection process. *See Grant*, 486 U.S. at 426 (rejecting argument that paid petition circulator "is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot");

Molinari, 82 F. Supp. 2d at 73 ("The reality is that all witnesses are partisan petition circulators whose goal is to convince voters to sign the petitions."). Moreover, even if we were to accept the defendants' understanding of petition circulators as quasi-public officials, rather than simply as advocates for a particular candidate, that characterization might just as easily lead us to conclude that district residents are even more likely to be motivated or well-positioned to engage in chicanery than non-residents, since district residents arguably have a stronger self-interest in which candidate ultimately gets elected and are more likely to be enmeshed in the intra-district political circles in which fraud might flourish.

The defendants' arguments based on the other two interests are even weaker, and both fail for similar reasons. Requiring a candidate to have a "modicum of support" within their district before their name appears on the ballot is well-established as a legitimate and important state interest, which helps to "avoid[ ] confusion, deception, and even frustration of the democratic process." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *see also Prestia v. O'Connor*, 178 F.3d 86, 88 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 539 (1999); *Schulz v. Williams*, 44 F.3d 48, 57-58 (2d Cir. 1994); *LaRouche v. Kezer*, 990 F.2d 36, 39 (2d Cir. 1993). However, that interest already is advanced by the requirement that candidates obtain a minimum number of signatures from district residents. *See* N.Y. ELEC. L. § 6-136 (McKinney 1998) (specifying number of signatures required from within a given political subdivision in order to gain access to ballot for various public offices). In light of that requirement, the state's interest in requiring a "modicum of support" from within the district

bears no relationship whatsoever to who actually witnesses or circulates the petition. *See Grant*, 486 U.S. at 425-26; *Krislov*, 226 F.3d at 865; *Molinari*, 82 F. Supp. 2d at 74; *Rockefeller v. Powers*, 917 F. Supp. 155, 164 (E.D.N.Y.), *aff'd*, 78 F.3d 44, 46 (2d Cir. 1996).

The defendants' final asserted interest — preventing non-resident witnesses from "imposing" the costs of a primary upon a district's residents fails for similar reasons. As with their assertion of the state's interest in ensuring a "modicum of support" from within the district, the defendants' argument with respect to the "imposition of primary election costs" appears to misunderstand the nature of the ballot access process — for candidates only are placed on the ballot if they obtain the requisite number of signatures by registered party members from within the electoral district, no matter where the witnesses live.[15] *See Molinari*, 82 F. Supp. 2d at 74. On the other hand, to the extent that the defendants mean to argue that the witness residence requirement helps to prevent non-residents from influencing politics within the district, that interest does not appear to be legitimate at all. A desire to fence out non-residents'

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15. We do not understand the defendants' argument to refer literally to the direct financial "costs" of holding a primary election, since the expenses associated with holding elections are not borne by district residents alone, but rather constitute "a charge upon the town or city . . . [or] village in which such election district is situated." N.Y. ELEC. L. § 4-136(1) (McKinney 1998). However, even if district residents were, in fact, somehow directly responsible for the costs of holding a primary election, those expenses only would be incurred after a sufficient number of district residents had themselves indicated their assent by signing the designating petition of an eligible candidate. *See Molinari*, 82 F. Supp. 2d at 74.

political speech — and to prevent both residents and non-residents from associating for political purposes across district boundaries — simply cannot be reconciled with the First Amendment's purpose of ensuring "the widest possible dissemination of information from diverse and antagonistic sources." *Krislov*, 226 F.3d at 866 (quoting *Buckley v. Valeo*, 424 U.S. 1, 49 (1976)); *see also Warren v. Fairfax County*, 196 F.3d 186, 190 (4th Cir. 1999) (en banc) (invalidating law prohibiting non-residents from using public forum); *VanNatta v. Keisling*, 151 F.3d 1215, 1218 (9th Cir. 1998) (invalidating law prohibiting candidates from accepting campaign contributions from outside their district), *cert. denied*, 525 U.S. 1104 (1999). In any event, the strength of this asserted interest in preventing outsiders from influencing politics within the district is undermined by the exception to the residence requirement that permits notaries public and commissioners of deeds — even if they live outside the relevant political subdivision — to circulate and witness candidates' ballot access petitions. *See* N.Y. ELEC. L. § 6-132(3) (McKinney 1998) (exception for notaries public and commissioners of deeds); *Molinari*, 82 F. Supp. 2d at 74.

Finally, the argument that the witness residence requirement does not affect Lerman's "absolute right to enter the 50th district . . . [to] express, as vigorously as she desired, her views and opinions about the issues facing the voters in that district and the candidates for the City Council" Supp. Brief of Defendant-Appellee Governor George E. Pataki at 7, is irrelevant. "We have consistently refused to overlook an unconstitutional restriction upon some First Amendment activity simply because it leaves other First Amendment activity unimpaired." *California Democratic Party v. Jones*,

120 S. Ct. 2402, 2412 (2000); *see also Grant*, 486 U.S. at 424 ("That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection."). *Cf. American Constitutional Law Found.*, 119 S. Ct. at 644 ("The ease with which qualified [individuals] may register to vote . . . does not lift the burden on speech" placed by voter registration requirement for petition circulators). The fact that the witness residence requirement "leaves open 'more burdensome' avenues of communication," therefore, "does not relieve its burden on First Amendment expression." *Grant*, 486 U.S. at 424.

Since the section 6-132(2) witness residence requirement does not bear *any* relationship to the asserted state interests, we conclude that the statute has no "plainly legitimate sweep" at all, *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973), and is therefore invalid on its face under the overbreadth doctrine. For the same reason, the plaintiffs would prevail even if we applied the *Salerno* standard, since they sufficiently have demonstrated that "no set of circumstances exists" in which the witness residence requirement constitutionally could be applied.

CONCLUSION

We hold that the requirement under Section 6-132(2) of the New York Election Law that witnesses to ballot access designating petitions be residents of the political subdivision in which the office is to be voted violates the First Amendment on its face. We therefore REVERSE the District Court's judgment and REMAND with instructions to enter judgment consistent with this opinion.

APPENDIX B — TRANSCRIPT OF CIVIL CAUSE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK FOR ORDER TO SHOW CAUSE DATED AUGUST 31, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-99-4901 (NG)

LERMAN,

Plaintiff,

v.

BOARD OF ELECTIONS,

Defendants.

August 31, 1999

Brooklyn, New York

TRANSCRIPT OF CIVIL CAUSE FOR
ORDER TO SHOW CAUSE
BEFORE THE HONORABLE FREDERIC BLOCK
UNITED STATES DISTRICT JUDGE

* * *

[2] THE CLERK: Civil cause for order to show cause, Lerman versus Board of Elections.

Appendix B

I'd ask Counsel if you can please step forward and state your appearances for the record.

THE COURT: What I suggest, folks, as you're walking up here, is that we've already had oral argument on this. I'm going to orally deliver my decision. If there's anybody that wants to make any further comments briefly before I do so, I'll give you the opportunity to do that. Otherwise, I'll just tell you what my decision is and I'll try to give some hopefully rational basis for it, and then you can take this as a final determination. Should anybody wish to go forward with it to the Second Circuit Court of Appeals, you can do so immediately.

Does anybody wish to comment?

MR. RICHMAN: Your Honor, Steven Richman, Counsel for the Board.

THE COURT: Yes.

MR. RICHMAN: I just wanted to make you aware that there were other issues involved at the hearing, including the lack of a valid Wilson Pakula (ph) certificate for this petition. The Board did not reach that specification because they ruled simply on the numbers, so that there will be other [3] grounds, if the matter is referred back to the Board, to disqualify this petitioner and this candidacy. Those were made timely, as per specifications.

THE COURT: Alright, but I'm going to dismiss the complaint, so that won't be — it will be academic.

Appendix B

Anybody else wish to comment?

MR. KOSINSKI: Your Honor, I'm Peter Kosinski from the State Board of Elections. I just want to note our appearance.

THE COURT: Alright, good to have you on board. Why don't you sit down and make yourself comfortable, in the mean time.

As I just mentioned, the Court's order will be to dismiss the complaint. It will be a final determination as a result thereof and the plaintiffs, if they desire to do so, will be able to immediately further their constitutional challenge to Section 6-132 of the election law, insofar as the fact that it requires a witness to be a resident of the affected election district.

That can be brought to the Circuit Court of Appeals and they can decide what the reach of *Buckley* ought to be. But after giving this careful consideration, I don't believe that *Buckley* calls for [4] the judicial invalidation of that provision of the election law.

Let me try to give you some understanding of how I arrived at that decision. What I will do is I will try to articulate it as clearly as I'm capable of doing so now and I'll get a transcript of this presumably tomorrow, and I'll probably edit it to put in citations and to clean up some grammatical aspects to it which may require some change in the draft of the transcript. I'll get it done by the end of the day tomorrow.

So in the mean time, you can file, Mr. Leeds, your appeal papers to the Circuit Court of Appeals, because you'll have a final order today, and I'll have the revisions, if there are any, to the oral decision that I'm rendering hopefully by the end of tomorrow, so that would be available to the Circuit Court forthwith as well.

Specifically, the plaintiffs seek a declaratory judgment and injunctive relief flowing therefrom to declare, as I have just indicated, that provision of Section 6-132 of the New York State Election Law unconstitutional, insofar as the fact that it requires witnesses to petitions for access to the ballot to be residents of the election district [5] affected.

Specifically, the case concerns the upcoming September 14, 1999 primary election for the Independence Party in the 50th New York City Council District in Staten Island. The plaintiffs allege that, once again, the provision of New York Election Law Section 6-132, which requires a witness to a designating petition to reside in the electoral district of the political office which the petition supports is unconstitutional under *Buckley v. American Constitution Law Foundation, Inc.*, 119 S. Ct. 636 (1999).

We have here two categories of plaintiffs, one represented by Anita Lerman, who resides outside of the 50th District, as a witness, and we have the plaintiffs Angelo D'Angelo and Pio D'Agostino, who were signators to the petition that was witnessed by Ms. Lerman.

In order for the putative candidate, John Sollazzo, to be on the ballot in this election, he would need 38 valid petition

signatures, which would be 5% of the registered 760 Independence Party members in the district.

The plaintiff Ms. Lerman, who lives in the 49th New York City Council District, solicited and [6] served as a witness for the plaintiffs Angelo D'Angelo and Pio D'Agostino, who were the signators to the petition to include Sollazzo on the primary ballot. D'Angelo and D'Agostino are enrolled members of the Independence Party and they live in the 50th District, and they are qualified voters of the Independence Party.

In total, Lerman witnessed a total of 58 signatures for Sollazzo's candidacy. On August 3rd, 1999, the New York City Board of Elections ruled that the 58 signatures witnessed by Ms. Lerman were invalid because she did not live in the district.

The three plaintiffs have brought their lawsuit against the New York City Board of Elections, which administers the primary election in the district pursuant to New York Election Law Section 3-200(1), and they also have joined as a defendant the New York State Board of Elections, which supervises the administration of state election laws and prepares sample designating petitions. *See* N.Y. Election L. Sec. 3-100. They have also named Governor Pataki, who is charged with the enforcement of the laws of the State of New York, including of course its election laws.

The lawsuit has been constituted as a [7] facial constitutional challenge to the witness residency requirement. In that respect, a facial challenge to a legislative act is the

most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the act would be valid. *See City of New York v. United States*, 179 F.3d 29, 33 (2d Cir. 1999) (citing *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (upholding the constitutionality of provisions of the Welfare Reform Act and Immigration Reform Act).

Now in respect to *Buckley*, the Court notes the following particularly pertinent aspects of *Buckley* in respect to the case at hand. There the Supreme Court reviewed several Colorado laws, including the requirement that initiative petition circulators be registered voters. Under Colorado law, a circulator had to attach to each petition section an affidavit containing inter alia the circulator's name and address and a statement that "he or she has read and understands the laws governing the circulation of petitions."

There are further requirements: to require the circulator to attest to the fact that each signature was affixed in the circulator's presence; [8] that each signature thereon was the signature of the person whose name it purported to be; and that to the best of the circulator's knowledge and belief, each person signing the petition section was at the time of signing a registered elector.

The Court notes that in terms of the requirements of the New York Election Law, witnesses also have to attest to a number of factors; specifically, I believe, if I recall correctly, that the person who signed the petition did represent himself or herself as a qualified person who could sign the petition.

Appendix B

In *Buckley*, the Supreme Court majority opinion commented that the Tenth Circuit properly sought guidance from the Supreme Court's recent decisions on ballot access, namely *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), and handbill distribution, referencing *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

The Court in *Buckley* stated: "Initiative petition circulators, as recognized by the Tenth Circuit, resemble handbill distributors in that both seek to promote public support for a particular issue or position, and initiative petition circulators also resemble candidate petition signature gatherers, [9] however, for both seek ballot access."

The Court stated as follows: "As the Tenth Circuit recognized in upholding the age restriction, the six-month limit on circulation and the affidavit requirement, states allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally. We have several times said no litmus paper tests will separate valid ballot access provisions from invalid interactive speech restrictions. We have come upon no substitute for the hard judgments that must be made, but the First Amendment requires us to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas."

The Court therefore went on to detail that they were satisfied that the registration restriction in question in *Buckley* significantly inhibited communication with voters about proposed political changes, and was not warranted by the

state's purported interests in administrative efficiency, fraud detection, and informing voters.

Thus, the Court concluded that the registration requirement in *Buckley* imposed a burden [10] on political expression that the state failed to justify. The court commented about the fact that the state's dominant justification appeared to be its strong interest in policing law breakers among petition circulators and that the State of Colorado seeks to ensure that circulators will be amenable to the Secretary of State's subpoena power, which did not extend beyond the state's borders.

Notably, the Court in *Buckley* stated that the plaintiffs did not challenge Colorado's right to require that all circulators be residents, a requirement that, as the Tenth Circuit said, " 'more precisely achieved' the state's subpoena service objective." *Id.* at 644.

The Court concluded, "In sum, assuming that a residence requirement would be upheld as a needful, integrity-policing measure, a question we, like the Tenth Circuit, have no occasion to decide because the parties have not placed the matter of residence at issue, the added registration requirement is not warranted. That requirement cuts down the number of message carriers in the ballot access arena without compelling cause."

Clearly, *Buckley* deals with matters which address political conversation, the exchange of [11] ideas, more in line with basic First Amendment concerns about speech, whereas on the other hand, the case that we have now before

us is a classic ballot access type of case, and the distinction is not without significance.

Notably, Justice Ginsburg, in writing for the majority in *Buckley*, makes no mention at all of the Supreme Court's case in *Burdick*, which specifically addressed the issue of ballot access. There is some passing reference to *Timmons*, which, as I noted, was a ballot access case.

When we're dealing with clear ballot access cases, the Second Circuit has made it clear, subsequent to *Buckley*, in *Prestia v. O'Connor*, 178 F.3d 86, 88 (2d Cir. 1999), that the language of *Burdick* is particularly apt in assessing the constitutionality of state election laws.

There the Second Circuit recently said, in keeping with *Burdick*: "We balance the regulations burden on the First and Fourteenth Amendment rights of voters against the state interests advanced by the regulation, taking into consideration the extent to which the burden is necessary to the advancement of those interests. When the regulation severely restricts the relevant rights, it must be narrowly [12] drawn to advance a compelling state interest. But where the regulation imposes only reasonable, nondiscriminatory restrictions on those rights, the state's important regulatory interests are generally sufficient to justify the restrictions. In assessing the burden imposed by the challenged regulation, we view the regulation in light of the state's overall election scheme." *Id.*

Why Justice Ginsburg did not make reference to *Burdick* in the *Buckley* decision can be debated. Certainly she was

conscious of the court's decision in *Burdick*. Curiously, in response to Justice Thomas's lone concurring opinion, where he does draw upon *Burdick* as well as *Timmons* in his assessment of the concepts that should be applied, she notes in footnote 12 that "[o]ur decision is entirely in keeping with the now settled approach that state regulations imposing severe burdens on speech must be narrowly tailored to serve a compelling state interest." *Buckley*, 119 S. Ct. at 642 n.12.

What I cull from looking at *Buckley* and comparing that with *Burdick* and with *Timmons* and with *Prestia* is that when you're not dealing with ballot access cases — where a candidate is trying to be [13] placed on the ballot — then the conceptual analysis is more in keeping with basic principles of First Amendment freedom of speech. And there, as Justice Ginsburg did, the inquiry is whether the so-called restrictions on that type of speech are significantly inhibited namely, whether the regulations present undue hindrances to political conversations and the exchange of ideas.

We're not dealing with that type of case, from my perspective, here, except insofar as it could be argued perhaps that the petition gatherers, namely the witnesses, have some First Amendment interest in political conversation and exchange of ideas as they circulate these petitions.

So what are the interests that I glean in this particular case? We have two sets of plaintiffs. First we have those two folks who actually are signators, and their interest in signing the petition is fairly straight forward. They are expressing their desire to have placed on the ballot a candidate, presumably of their choice, or even if not of their

choice, somebody who they believe should have the right to stand for election in the primary election. And that person is somebody who, if elected, will be representing those signators as a [14] city councilperson and passing laws and acting in a way which will directly affect the rights of those people.

But that interest is one of ballot access, clearly. There is no restriction in terms of the speech or the exchange of political ideas, such as the initiative scenario in *Buckley*. I think that the way to analyze those plaintiffs' rights is strictly in accordance with the language reinforced in *Prestia*, taken from *Burdick*, and the Court does not believe that their interests are such that conjure up a strict type of scrutiny.

Notably in *Timmons*, in respect to ballot access, the Court specifically said: "Ballots serve primarily to elect candidates, not as a fora for political expression." *Timmons*, 520 U.S. at 363. So the Supreme Court has clearly drawn a distinction between ballot access, which it does not perceive to be a fora for political expression on the one hand, and cases such as *Buckley*, which more closely reflect a serious challenge to political expression, where we're talking about broad-scale initiatives to allow the public to express itself on matters of public interest of a statewide nature. So there is that distinction, which I think has to be recognized in [15] assessing the rights of the parties here.

With respect to the interests of the witness, specifically Ms. Lerman's interest, she does not have any interest in who is going to be governing here. The person who will be elected from the 50th District has no jurisdiction over her district.

Her interest, arguably, could relate to some First Amendment speech concerns, but it seems marginally so.

I guess, to the extent that she would like to broaden the elective process or be able to express her ideas when she walks into the 50th District, her speech is affected. A petition gatherer for ballot access would have the absolute right to express her opinion or her thoughts about any of the issues in the upcoming election, the qualifications of candidates whom she believes would be the best candidate from that district. That would be expressive speech which would be, arguably, perhaps worthy of some First Amendment considerations, though marginally so, because once again, she's not going to be affected by the election results.

Her status as a witness, separate and apart from her status as a person who can articulate her opinions or beliefs about anything she wants as [16] she goes door to door collecting petitions, is somewhat different. There she's serving in a somewhat ministerial capacity, just to have the petition gatherers sign in her presence and to attest, under penalties of perjury, that the requirements of the election law have been complied with. But that seems to me a different interest than the interests subsumed by her ability to speak out on any particular issue.

There is nothing that prevents Ms. Lerman from doing that in the residency requirement. There is no correlation to that arguable First Amendment interest, because she could walk into that district or any other district she wants and say whatever she wants to anybody that she comes upon in that district. But her status as a witness is not one that significantly

affects, if at all, the interests that are identified by the Supreme Court in *Buckley*, namely once again, political conversation and exchange of ideas. Therefore, we're not dealing with anything that requires strict scrutiny in respect to the interests of any of the plaintiffs in this case.

The specific language from *Prestia* and from *Burdick*, et cetera, is that where the regulation imposes only reasonable, non-discriminatory [17] restrictions on the rights of a party, the state's important regulatory interests are generally sufficient to justify the restrictions. The regulations impose only reasonable, nondiscriminatory restrictions on the rights of the signators to the petition, because these folks clearly have ample opportunity to support the candidacy of anyone they choose to support in their particular party.

They don't have to necessarily wait until somebody comes knocking on the door and just function in that passive, hopeful role that somebody will come with a petition for them to sign to support a candidate. They can take a more proactive course of conduct. They can serve as a petition gatherer — as witnesses in their own right. There's nothing that prevents the signators from doing that, from organizing, from reaching out to other residents, other qualified voters in the district to support a particular candidate.

I just cannot conclude that there is a compelling interest here on behalf of the signators to wait for somebody to come with a petition for them to be able to express the rights to ballot access that are identified in the law. So I view the rights [18] of the signators and whatever restrictions can arguably be conjured up in terms of the witness residency

requirement to be just reasonable, nondiscriminatory restrictions at best on their rights. Therefore, you have to analyze the state's regulatory scheme in light of that.

Once again, as far as the restrictions on the interests of the witness herself, I find them to be not terribly compelling. Arguably in that respect, it may well be that a higher authority would find that the witness doesn't have standing under *United States v. Hays*, 515 U.S. 737 (1995). *Hays* instructs us that it is settled that as far as constitutional minimum standing requirements are concerned, we're dealing with three elements; one, that the plaintiff must have suffered an injury in fact, namely an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; second, there must be a causal connection between the injury and the conduct complained of; and, third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

In dealing with the interests of Ms. [19] Lerman, I find that arguably she may be able to assert some standing vis-á-vis her First Amendment rights to express her views and exchange ideas. But it's very questionable, because basically her function as a witness is strictly to act in a much more administrative or ministerial capacity than to serve as a basis for promoting her opportunities to articulate her views on any particular public issue. But nonetheless, in light of my decision, the standing issue is not terribly compelling here, because I'm deciding the case on the merits, in any event.

Appendix B

So what are the interests that are put forth here by the state? The residency requirement will help assure the integrity in the election of the 50th District by guaranteeing that local residents, for whom the election will have the most direct effect, are most involved in the process. By contrast, non-residents will not be governed by the results of the election outcome and have no particular motivation to assure its integrity.

Individuals who seek to influence elections outside of their own election districts may have interests correlated to advancing the goals of their party. But in terms of the interests to ensure [20] that the best representatives of the community are chosen to govern, it does not have any cogency, because they're not going to be subject to that governance.

The issue of preserving order is one that we should reflect upon. The state has an interest in preserving order and preventing chaos in the electoral process, and preventing a flood of out of district witnesses will help preserve order. As the Supreme Court said in *Buckley*, "We have also recognized, however, that 'there must be a substantial regulation of elections if they are to be fair and honest, and if some sort of order, rather than chaos, is to accompany the democratic processes.' " *Buckley*, 119 S. Ct. at 640 (citation omitted).

The issue of prevention of fraud is also something which should be reflected upon. I believe that the residency requirement does have some correlation to the prevention of fraud. The local Board of Elections has copies of the party

members' buff cards, which contain the members' signatures, which can be used to verify the witnesses' signatures.

It would be more difficult for the [21] election board to verify signatures using buff cards from places remote in the state, and we all know that these decisions have to be made very quickly and courts have to be able to make quick decisions, also, witnessed by the fact that it's now 25 to 7:00 and I'm trying to make this decision expeditiously, right now, as we speak. Also, it is more likely that a witness from a political district will be familiar with the signators and able to verify their identity, which also will help avoid any possible fraud.

The Court notes with interest that you can have statewide elections, you can have elections that cover congressional districts, you can have elections that cover very small districts, such as maybe councilman districts or maybe even smaller units. The issue of fraud is something which could perhaps be analyzed separately in respect to the particular election that's extant.

For example, if we're dealing with the statewide election system, then the residency requirement is one which doesn't have any necessary correlation to fraud within the State of New York, because the witness gatherer can go to any reaches of the State of New York and get signatures from all over the state, and the subpoena power applies [22] statewide.

In *Buckley*, the Court intimated that it may well be that the residency requirement in terms of statewide initiatives would be a relevant factor, because it would prevent people

from outside of the state from coming into the state to gather petitions, and those people would be outside of the reach of the subpoena power of the State of Colorado. So we're not dealing with problems with reaching witnesses in terms of the subpoena power, when we talk about statewide elections because the subpoena power is statewide.

Notably, on a statewide election basis, everybody who is involved with a statewide office has exactly the same interest. The person who is going to be elected will be governing that person and they have a direct interest in the outcome of the election.

That same issue is marginalized and minimized as we go down the line to the smaller districts. As witnessed by Ms. Lerman, she has no interest in the councilmanic district, specifically the 50th District, in terms of governance by who is going to be elected. She would have an interest if she was a petition gatherer on a statewide election.

[23] But nonetheless, we are not dealing with an as-applied challenge; we're dealing with a facial challenge. And the residency requirement is clearly applicable on a statewide basis in statewide elections. I think it also is applicable in respect to the local elections as well. But perhaps if we're dealing with an as-applied challenge, the analysis might be somewhat different, but here we're dealing with a facial challenge.

The Court, in any event, even if it was an as-applied challenge, would nonetheless find that the regulation is appropriate, moreso perhaps because the witness does not

have any stake in the election in the particular localized district and has no particular interest in maintaining the integrity of the elective process or is certainly not comparable to somebody who is a witness who resides in the affected election district.

So in sum, while I have burdened you with all of my commentary, the Court finds that whether you view this as a classic political speech case à la *Buckley*, or one that's more confined to ballot access, such as *Prestia*, *Timmons* and *Burdick*, regardless of how these different types of scenarios are conceptualized in terms of First Amendment [24] issues, we do not have any significant constitutional inhibition here that's been visited upon Ms. Lerman, assuming that she even has standing to bring her litigation.

In respect to the people who signed the petitions, it cannot be said that the witness requirement constitutes a serious impediment to their rights. In fact, I don't see where it constitutes any impediment to their rights whatsoever. Once again, for people to wait until somebody comes knocking on their door in order to express their choice of their candidate seems like the type of passive act which cannot rise to the level of any significant constitutional issue or restriction on their right to support whoever it is they wish to support.

Notaries public come into play here. To the extent that notaries public can be reached throughout the State of New York, certainly that aids in the process that would be available to gather signatures from any district, in any election, throughout the State of New York. These people

are qualified public officials and they have a different status than witnesses in general. This also applies to a commissioner of deeds. It does not undermine [25] the residency requirement, namely that they are treated differently than witnesses otherwise.

I cite the case of *In Re Patterson*, 312 N.Y. S.2d 300, 303 (3d Dep't 1970), confirming that which we know, that a notary is a public officer, and *Sumkin v. Hammonds*, 677 N.Y. S.2d 734 (S. Ct. Nassau County, 1998), stating, "A notary public is a public official and as such assumes a position of trust which demands a high degree of conscientious public service. A notary public must carry out her duties and functions only in accordance with the law. This is vital if the public interest is to be served." These nonelected public officials are deemed to be nonpartisan and their interests are deemed to be aligned with those of the state, to assist in the protection of the integrity of the electoral process.

So the notaries public serve a two-edged sword, as do the commissioners of deeds. I think they are compatible, by reason of the public trust that they assume, with the thought of maintaining some integrity in the electoral process. Second, they increase the pool of those folks who can come into any particular election district, to make it even more easy for somebody who wishes to support a particular candidate, to gather signatures, to put [26] that person on the ballot.

So in sum, the Court will dismiss the plaintiffs' complaint in all respects. We'll try to clean up my verbalizations

forthwith, so you can have the benefit of whatever I've said today to present to the Second Circuit, should you wish to do that.

Are there any residual matters that need to be attended to here?

MR. LEEDS: Just one, your Honor.

THE COURT: Yes.

MR. LEEDS: Could the Court transmit the file to the Second Circuit?

THE COURT: I'll ask Mr. Innelli, the court clerk, to assist you as best as we can to expedite the administrative matters that you have to attend to to get the matter to the Second Circuit, okay?

MR. LEEDS: Thank you.

THE COURT: Thank you very much for all of your assistance.

* * * *

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DISMISSING PLAINTIFF'S COMPLAINT DATED SEPTEMBER 1, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Cv-99-4901(NG)

ANITA LERMAN.,

Plaintiff,

– vs –

BOARD OF ELECTIONS, et. al.,

Defendants.

ORDER

For the reasons stated on the record at oral argument on August 31, 1999, the plaintiff's complaint is dismissed in it's entirety.

SO ORDERED.

s/ Frederic Block
UNITED STATES DISTRICT
JUDGE

DATED: Brooklyn, N.Y.
September 1, 1999

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DISMISSING PLAINTIFF'S COMPLAINT DATED AND FILED SEPTEMBER 3, 1999

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

99-CV-4901 (NG)

ANITA LERMAN,

Plaintiff,

– against –

BOARD OF ELECTIONS, et al.,

Defendants.

JUDGMENT

An Order of the Honorable Frederic Block, United States District Judge, having been filed on September 3, 1999; for the reasons stated on the record at oral argument on August 31, 1999 dismissing the plaintiff's complaint in its entirety; it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendants; and, that the plaintiff's case is dismissed in its entirety.

Appendix D

Dated: Brooklyn, New York
September 3, 1999

ROBERT C. HEINEMANN
Clerk of Court

By: s/ James Giokas
JAMES GIOKAS
Chief Deputy Clerk

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 13, 2000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of December two thousand

Present:

Hon. Wilfred Feinberg

Hon. Dennis Jacobs

Hon. Chester J. Straub

CIRCUIT JUDGES,

Docket No. 99-9015

Lerman,

Appellant,

v

Appendix E

Board of Elections,

Appellee.

A petition for panel rehearing having been filed herein by New York State Board of Elections

Upon consideration thereof, it is

Ordered that said petition be and it hereby is **DENIED.**

FOR THE COURT
ROSEANN B. MACKECHNIE,
Clerk

By: s/ Beth J. Meador
Beth J. Meador
Administrative Attorney

DEC 13 2000